SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 802

JOHN C. LEWIS, AS RECEIVER OF THE HANCOCK NATIONAL BANK OF SPARTA, GEORGIA, PETITIONER,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 26, 1934

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[fol. 1]

IN UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF GEORGIA, MACON DIVISION

No. 176. In Equity

FIDELITY & DEPOSIT COMPANY OF MARYLAND, Complainant-Appellant,

versus

W. K. HOWARD, as Receiver of the Hancock National Bank of Sparta, Georgia, Defendant-Appellee

[fol. 2] IN SUPERIOR COURT OF HANCOCK COUNTY

ORIGINAL BILL

STATE OF GEORGIA,
County of Hancock:

To the Superior Court of said County:

The petition of Fidelity & Deposit Company of Maryland (herein called the plaintiff) shows:

1. The plaintiff is a corporation created and organized under the laws of the State of Maryland; is engaged in the business of fidelity insurance; and is authorized and qualified under the statutes of the State of Georgia to become surety on bonds authorized or required under the laws of said State.

2. The defendant is W. K. Howard, of said county, in his capacity as receiver of the Hancock National Bank of Sparta, a banking institution organized as a National Bank, under the laws of the United States, with its principal office and place of business in said State and County.

3. On July 6, 1928, His Excellency, L. G. Hardeman, then Governor of Georgia, in pursuance of the statutes of said State, for such cases made and provided, designated and appointed said Hancock National Bank of Sparta as a state depository for the term of four years, from the 6th day of

July, 1928, to the 6th day of July, 1932, upon its giving bond in the sum of ten thousand dollars and on condition that said bank would pay semi-annually interest at the rate of 2% per annum, payable January 1st and July 1st of each year, on daily balances of public money or effects belonging to the State of Georgia and deposited with said bank, copy of said order being attached as Exhibit A, with leave of reference.

4. Said Hancock National Bank of Sparta accepted said appointment and on the 12th day of July qualified as such [fol. 3] state depository by filing in the office of the Governor, a bond in the form and manner prescribed by the statutes of said State, in which said bond said Hancock National Bank was principal and the plaintiff was surety, in the sum of ten thousand dollars, a copy of which is hereto attached and made a part hereof, with prayer for usual leave of reference, and marked Exhibit "B", and the resolution authorizing same attached as Exhibit C.

5. On July 31, 1928, said bond having been approved, said L. G. Hardeman, Governor as aforesaid, issued his executive order and proclamation declaring said bank a state depository, copy of same being attached as Exhibit D.

6. Deposits of money belonging to the State of Georgia and being taxes collected for said State by the Tax Collector of Hancock County, were deposited in said bank as a state depository.

7. On May 23, 1932, said Hancock National Bank of Sparta having become insolvent, the Comptroller of the Currency of the United States, in pursuance of the Acts of Congress for such cases made and provided, appointed a receiver, therefor, and said defendant is the receiver appointed by said Comptroller and is in possession and control, as such, of the business, the assets and properties of said Hancock National Bank of Sparta; and is now engaged in liquidating said assets in order that lawful claims against said bank may be paid.

8. At the time said bank failed and was taken over by the Comptroller of the Currency and the defendant as receiver as aforesaid, the State of Georgia had there a deposit of public funds belonging to said State in the amount of six thousand one hundred fifty-seven and 41/100

[fol. 4] ($6,157.41) dollars; and upon demand and refusal of said bank and the receiver in charge thereof to pay over the same to the State of Georgia, His Excellency, Richard B. Russell, Jr., Governor of said State, and M. L. Ledford, the State Treasurer of said State, made demand on the plaintiff as surety on the official depository bond aforesaid to pay to the State of Georgia said sum with the interest thereon.

9. On July 28, 1932, the plaintiff, in response to the demand of the Governor and the State Treasurer of said State, acting on behalf of the State of Georgia, paid to the State of Georgia the full amount of its said deposit of funds in said bank and the interest thereon in the total amount of six thousand two hundred twenty-one and 73/100 dollars ($6,221.73); and the said Governor and State Treasurer, in behalf of said State, duly assigned to the plaintiff its claim against said bank and contracted that the plaintiff should be entitled to all the rights of the State of Georgia in respect of said deposit. Copy of said assignment is attached as Exhibit E, with prayer for the usual reference.

10. It is provided in the laws of said State (Political Code 1252) that bonds given by banks appointed as state depositories "shall have the same binding force and effect as the bond required by law to be given by State Treasurers;" and it is provided in said laws (Political Code 218) in respect of the bond of the State Treasurer that "a lien is hereby created in favor of the State upon the property of the treasurer to the amount of said bond and upon the property of the securities upon his said bond to the amount for which they may be severally liable, from the date of the execution thereof;" and under the statutory enactments, as construed and applied by the Supreme Court of this State, [fol. 5] a lien arose in favor of the State of Georgia upon all the property of said bank, to the amount of said bond, from the date of the execution thereof, as respects all public funds of the State on deposit therein.

11. The legal remedy for the enforcement of said lien would be by the issuance of execution by the Governor for the amount due to the State and the levy thereof on the property of said bank, but all the property of said bank, being in the hands of the defendant, as receiver as afore-

said, is not subject to levy and sale by such process; and for lack of a adequate remedy at law it is necessary to sue in equity to enforce the same.

12. The plaintiff, upon its having, as surety on said bond, discharged the State's claim against said bank in full, by said act became entitled by subrogation, as well as by the formal transfer to it aforesaid, to all of the State's rights as against said bank and its properties.

13. The plaintiff has caused its claim to be duly presented to said defendant as receiver and has demanded of said receiver that he recognize the lien existing on said assets of said bank in his hands, but said receiver, while recognizing that the plaintiff is a creditor of said bank to the extent aforesaid, denies that the lien aforesaid is enforceable against the properties of said bank in his hands, and, acting under instructions of the Comptroller of the Currency, has refused to recognize any rights of the plaintiff under its lien as aforesaid or to pay its claim in priority of payment before distributing the assets of said bank or the proceeds thereof in ratable dividends to such ordinary creditors of said bank as shall prove their claims. The amount of all the properties and assets of such bank [fol. 6] is not such as to discharge all claims proved against it, and unless the lien herein asserted by the plaintiff be recognized and enforced against the properties of said bank in the hands of defendant as receiver aforesaid, it will lose all or the greater part of its said debt,

Wherefore, the plaintiff prays:

(a) That the Court do find, declare and decree that the plaintiff has, as against said bank and the defendant, as receiver as aforesaid, a lien ranking in priority according to the date of said bond, on all the properties of said bank now in custody or control of said defendant as receiver as aforesaid, and the proceeds of all of the assets of said bank which came into his custody and control by virtue of said receivership, for the amount of the debt of the State of Georgia against said bank, which it (the plaintiff) as surety as aforesaid has discharged and paid off, and for interest thereon.

(b) That the Court by judgment and decree do order and instruct said receiver that out of the assets of said

bank or the proceeds thereof he do pay off and discharge said lien and the debt thereby represented, making ratable distributions to the other creditors of said bank which have no lien or other right to priority of payment.

(c) That the Court do grant such other and further relief and remedy as may be legal, equitable, just and/or appropriate in the premises.

(d) That process do issue requiring the defendant to appear at the next term of this Court to answer this complaint.

(Signed) Little, Powell, Reid & Goldstein, Plaintiff's Attorneys, 1608-22 Marietta St. Bldg., Atlanta, Ga.

[fol. 7] EXHIBIT "A" TO ORIGINAL BILL

State Depository

STATE OF GEORGIA,
Executive Department, Atlanta:

By authority of an Act of the General Assembly entitled "An Act to establish State Depositories in certain cities in this State" approved October 16, 1879, and all Acts amendatory thereof, and codified as sections 1249 et seq. of Vol. 1, of the Code of 1910, and acts amendatory thereof, it is

Ordered: That the Hancock National Bank of Sparta, a bank located in the City of Sparta be and the same is hereby appointed a State Depository for the term of four years from the sixth day of July, 1928, and that upon the execution by said Bank of a good and solvent Fidelity bond in the sum of Ten Thousand Dollars, to be approved by the Governor, an order be issued and published in the city where said Bank is located, designating the counties whose Tax Collectors and other officers shall be instructed to pay into said Bank, all money collected by them for or on account of State taxes; except such as may be paid directly into the State Treasury.

This appointment as State Depository is made, however, upon the condition that said Bank will pay semi-annually, until further order, interest at the rate of two per cent

per annum, and provided that said rate may from time to time be increased by order of the Governor, not to exceed three per cent. per annum, payable on the first days of January and July of each year, on daily balances of public money or effects belonging to the State of Georgia, and deposited with said Bank, as provided by law, and make no charges against the State for exchange on such money so [fol. 8] deposited, or for the transmission of currency to the State Treasury, when directed so to do by the State Treasurer.

This 6th day of July, 1928.

(Signed) L. G. Hardeman, Governor. By the Governor: Mattie H. Carrington, Secretary Executive Department.

EXHIBIT "B" TO ORIGINAL BILL

GEORGIA,
Hancock County:

Know all men by these presents, that we The Hancock National Bank of Sparta, Georgia, as Principal, and The Fidelity & Deposit Company of Maryland a solvent Surety Company admitted to do business in the State of Georgia, as Surety, are held and firmly bound unto his Excellency, L. G. Hardeman, Governor of said State, and his successors, in office in the sum of Ten Thousand Dollars, for the payment of which, we bind ourselves, our successors, heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seal and dated, this 12th day of July, A. D. 1928.

The condition of the above bond is, that whereas, the said Hancock National Bank of Sparta, a Bank incorporated by the laws of *the* Georgia and doing business in the City of Sparta, Georgia, was on the 6th day of July, 1928, duly appointed by the Governor of said State, Depository for the term of four years from July 6th, 1928, under and by virtue of the Act of the General Assembly of said State, entitled "An Act to establish State Depositories in the cities of Atlanta, Athens, Augusta, Columbus, Macon, Savannah, [fol. 9] Rome, Americus, Albany, Lagrange, Gainesville, Griffin and Hawkensville, and to prescribe their duties," approved October 16, 1879, and the several Acts amend-

atory thereof and codified as Sections 1249 et seq. of Vol. 1 of the Code of 1910, and Acts amendatory thereof; and whereas, the said Bank has duly accepted said appointment, and is about to enter upon the discharge of its duties as such Depository, in accordance with resolutions of the Board of Directors, which are hereunto appended.

Now, if the said Bank shall faithfully perform all such duties as shall be required of it by the General Assembly, or the laws of this State and shall faithfully account for all the public money or effects that may come into its hands during its continuance in office, then said bond shall be void, otherwise, of full force.

In witness whereof, the said the Hancock National Bank of Sparta, Georgia, as principal, has, by its President hereunto set its hand and seal, and the said Fidelity & Deposit Company of Maryland, as Surety, have hereunto set their hands and affixed their seals, on this, the day and year first aforesaid.

Signed, sealed and delivered in presence of:

The Hancock National Bank of Sparta, by M. W. Harris, President. Fidelity & Deposit Company of Maryland, by Edwin R. Haas, Agent. H. A. Berry, N. P. H. Co. Ga., Lindley W. Bode, as to Surety.

[fol. 10] EXHIBIT "C" TO ORIGINAL BILL

Office of The Hancock National Bank of Sparta, Georgia

Sparta, Ga., July 12th, 1928.

Whereas, on the 6th day of July, 1928, the Hancock National Bank of Sparta, Georgia, was by authority of law, appointed by the Governor a State Depository, for a term of four years from the 6th day of July, 1928, upon the giving by said Bank a good and solvent bond in the sum of Ten Thousand Dollars, therefore, be it

Resolved, that said appointment be accepted, and the Board of Directors of said Bank hereby authorize and instruct M. W. Harris, President, to execute a good and solvent bond in the sum of Ten Thousand Dollars, payable to the Governor of Georgia, and his successors in office, in

order to carry out and put into effect the appointment of said Hancock National Bank of Sparta, Ga., as a State Depository.

(Signed) M. W. Harris, President of said Bank. (Seal Bank.) Attest: S. H. Hollis, Secretary Board of Directors.

At a meeting of the Board of Directors of The Hancock National Bank of Sparta, Ga., a quorum being present, the above and foregoing resolution was adopted, the same being a true copy thereof.

This 12th day of July, 1928.

(Signed) S. H. Hollis, Cashier. (Seal Bank.)

EXHIBIT "D" TO ORIGINAL BILL

STATE OF GEORGIA,
Executive Department, Atlanta:

The Hancock National Bank of Sparta located in the City of Sparta, having been appointed a State Depository, [fol. 11] and having executed and filed in this office a bond in the sum of Ten Thousand Dollars, conditioned for the faithful discharge of its duties, which has been accepted and approved by the Governor, it is therefore

Ordered: That the Tax Collector of the County of Hancock be and he is hereby instructed to pay over to said bank all moneys collected by him for and on account of State taxes, except such as may be paid directly into the State Treasury and that notice of this order be given by publication in some newspaper of general circulation published in the City where said bank is located.

This 31st day of July, 1928.

(Signed) L. G. Hardeman, Governor. By the Governor: Mattie H. Carrington, Secretary Executive Department.

EXHIBIT "E" TO ORIGINAL BILL

In consideration of payment to the State of Georgia of the sum of Six Thousand One Hundred Fifty Seven and

41/100 ($6,157.41) as principal, and $71.32, as interest, the State of Georgia, acting through the undersigned, M. L. Ledford, as State Treasurer, and Richard B. Russell, Jr., as Governor, and in behalf of the State of Georgia, acknowledge payment in full of the monies deposited by the State of Georgia in the account of M. L. Ledford, as Treas-
[fol. 12] urer of the State of Georgia, in the Hancock National Bank of Sparta, Georgia, the amount of said deposit being said sum of $6,157.41, and lawful interest to this date being the sum of $71.32, the payment of both sums by the Fidelity & Deposit Company being hereby acknowledged, said payment being made because of the liability of said Fidelity & Deposit Co., as surety on its certain bond No. 3463845, given by Hancock National Bank of Sparta, Georgia, Principal, as a lawful depository, and Fidelity & Deposit Company, as Surety.

Said surety having paid to the State of Georgia in full the liability of the principal, now in consideration thereof the said State of Georgia transfers, conveys and assigns to said surety, Fidelity & Deposit Company, all of the right, title and interest of the State of Georgia, and/or of the Governor of Georgia, and/or of the Treasurer of Georgia, in and to all funds of the State of Georgia, or of the Treasurer of the State of Georgia, on deposit in said Hancock National Bank, including all rights to preference and all rights to liens which may exist on account of said funds, this assignment being intended to convey to the surety, the Fidelity & Deposit Company, all such rights, preferences, liens and claims which may exist on account of said funds, and said deposits, and the said Fidelity & Deposit Co., being authorized to file such claims or proceedings as may be necessary and proper to obtain payment to itself of such sums as may be due on account of such funds and deposits, with the right to proceed in the name of the State of Georgia, and/or M. L. Ledford, Treasurer of said State, and/or Richard B. Russell, Governor of Georgia, and his successors in office, for the use of said Fidelity & Deposit Company, if it deems same proper, such actions or proceedings so brought to be without cost or expense to the State of Georgia.

[fol. 13] In witness whereof, the Treasurer of Georgia and the Governor of Georgia have severally set their official

hands and caused their official seals to be affixed, this 28th day of July, 1932.

(Signed) M. L. Ledford, as Treasurer, State of Georgia. (Seal.) (Signed) Richard B. Russell, Jr., as Governor of Georgia. (Seal.)

(Filed in office Nov. 26, 1932, W. B. Dickens, Clerk).
Filed April 24, 1932.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed May 11, 1933

Comes now W. K. Howard in his official capacity as Receiver of the Hancock National Bank of Sparta, the defendant in the above stated cause in equity, and files his motion to dismiss plaintiff's petition thereon on the following grounds:

1

Plaintiff's petition, insofar as it seeks to enforce a lien against the assets of the Hancock National Bank in the hands of this defendant as receiver, sets out no valid cause of action against this defendant.

2

There is no equity in plaintiff's petition.

3

The execution on the 12th day of July, 1928, by the Hancock National Bank of the depository bond referred to in paragraph 4 of plaintiff's petition was without authority of law and contrary to public policy.

[fol. 14]

4

The execution of said bond was beyond the charter power of said Hancock National Bank.

5

The execution of said bond did not have the effect of creating a valid lien in favor of the State of Georgia upon the assets of said bank.

Wherefore, Defendant prays that his said motion be sustained.

Sam H. Wiley, Miller & Lowery, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER ON MOTION TO DISMISS—Filed July 8, 1933

The defendant, W. K. Howard, as Receiver of the Hancock National Bank of Sparta, having filed a written motion to dismiss plaintiff's petition in the above stated case, and said motion coming on regularly to be heard, after argument had for both plaintiff and defendant,

It is considered, ordered, and adjudged that said motion be, and the same is, hereby sustained, and said petition insofar as it seeks to establish a lien in favor of plaintiff on the assets and/or properties of the Hancock National Bank of Sparta in the hands of said Receiver is hereby dis-[fol. 15] missed. However, said petition is retained for the sole purpose of allowing plaintiff to establish its claim as a general creditor of the bank.

So ordered and adjudged in open Court this July 7, 1933.

Bascom S. Deaver, U. S. Judge.

Exception noted and allowed. July 7, 1933.

Bascom S. Deaver, Judge.

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed July 31, 1933

The defendant in the above stated cause having duly filed his written motion to dismiss the petition of the plaintiff in said cause, and the same having come on regularly for hearing before me on July 7, 1933, after argument had, I sustained said motion to dismiss said petition insofar as said petition seeks to establish a lien in favor of the plaintiff on the assets and/or property of the Hancock National Bank of Sparta in the hands of said Receiver, and dismissed the petition insofar as it seeks to establish such a

lien, but retained the petition, however, for the purpose of allowing the plaintiff to establish its claim as a general creditor of the bank, and entered a judgment to that effect on July 7, 1933.

And now the cause being submitted to me upon the petition and a stipulation by the defendant made in open Court that the allegations of fact contained in said petition are [fol. 16] true, except the allegation that Hancock National Bank of Sparta qualified as a State depository by filing in the office of the Governor a bond in the form and manner prescribed by the statutes of Georgia, and the allegation that a lien arose under the statutory enactments embodied in No. 1252 and 218 of Georgia, upon all the property of said bank to the amount of said bond, from the date of the execution thereof as respects all public funds of the State on deposit therein; defendant admitting however, that the bond, in the form and manner prescribed by the statutes of Georgia for State depository bonds, set forth in plaintiff's petition, was executed on July 12, 1928, by the officers of said bank and filed in the office of the Governor, the Court finds the following facts:

1

Fidelity & Deposit Co. of Maryland, is a corporation organized under the laws of the State of Maryland, authorized and qualified under the statutes of Georgia to become surety on bonds authorized or required by the laws of said State.

2

On July 6, 1928, L. G. Hardeman was the duly elected and qualified governor of the State of Georgia and he did on said date, appoint Hancock National Bank of Sparta, Ga., as the State depository. The exhibit of said proclamation marked Exhibit A, and attached to said bill is a true and correct copy of the original proclamation.

3

M. W. Harris, was the duly elected president of the Hancock National Bank of Sparta, on the 6th day of July, 1928, [fol. 17] S. H. Hollis, was secretary of the board of directors and M. W. Harris executed the bond sued on in this case as president of said Hancock National Bank of Sparta.

4.

A meeting of the board of directors of the Hancock National Bank of Sparta did on the 12th day of July, 1928, authorize M. W. Harris to execute the said bond and to attach thereto the seal of the said Hancock National Bank.

5

At the time the Hancock National Bank of Sparta, Ga., was declared insolvent, there was on deposit in the name of M. L. Ledford, Treasurer, of the State of Georgia, the sum of $6,157.41.

6

The said sum represented taxes due the State of Georgia that had been collected in Hancock County and were deposited in said bank by the said treasurer in his name as aforesaid.

7

Fidelity & Deposit Co. of Maryland, the plaintiff herein, paid to the State of Georgia, $6,157.41, as principal and $48.59, as interest.

8

The State of Georgia, by Richard B. Russell, Jr., as Governor, and M. L. Ledford as Treasurer, did assign to the Fidelity & Deposit Co., the rights of the State of Georgia [fol. 18] against said Hancock National Bank and its receiver, in the manner and form set out in the assignment attached to the bill, which I find to be a true copy of the original.

9

The receiver has paid to Fidelity & Deposit Co., no part of said sum of $6,157.41.

Conclusions of Law

Upon the foregoing facts, I conclude:

(a) Fidelity & Deposit Co., by subrogation and by transfer, is entitled to all of the right vested in the State of Georgia, to said $6,157.41.

(b) The said plaintiff herein, Fidelity & Deposit Co., is not for any reason entitled to priority of payment out of the assets in the hands of the receiver.

(c) Fidelity & Deposit Co., is entitled to assert against the receiver, a claim for $6,157.41, as principal and $48.59, as interest, to date said bank closed, as a general claim and that the receiver should pay to Fidelity & Deposit Co. on said claim the pro rata dividends declared by the Comptroller of Currency for distribution to general creditors.

This 31 day of July, 1933.

Bascom S. Deaver, U. S. Judge.

[fol. 19] IN UNITED STATES DISTRICT COURT

FINAL DECREE—Filed July 31, 1933

The findings of fact and conclusions of law having been announced in the above stated case, it is considered, ordered and decreed, that the petition of plaintiffs herein, insofar as it seeks to establish a lien upon the property of the Hancock National Bank in the hands of the receiver, be and the same is hereby denied.

It is further ordered and decreed, that neither the State of Georgia nor the Fidelity & Deposit Company of Maryland, has any right to assert a claim for lien or security in any manner or form against the assets of the said Hancock National Bank in the hands of the said receiver and has no priority or right to preference against any assets of the bank in the hands of its receiver on any of the grounds asserted in the bill of complaint.

It is further ordered and decreed, that the claim of Fidelity & Deposit Company of Maryland, as transferee and assignee of the State of Georgia, be and the same is hereby allowed for the amount of $6,206.00, being principal and interest, as a claim of a general creditor, to be paid pro rata with all other general creditors of Hancock National Bank, in accordance with the provisions of law relating to the liquidation of national banks by the Comptroller of Currency.

It is further ordered and decreed, that all costs of this proceeding be taxed by the clerk of this Court against the plaintiffs.

So ordered and decreed this 31 day of July, 1933.

Bascom S. Deaver, United States Judge.

[fol. 20] IN UNITED STATES DISTRICT COURT

No. 176 In Equity

FIDELITY & DEPOSIT CO. OF MARYLAND, Complainant,

vs.

W. K. HOWARD, as Receiver of Hancock National Bank of Sparta, Georgia, Defendant

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed Aug. 5, 1933

To the Honorable Bascom S. Deaver, Judge of the District Court of the United States for the Middle District of Georgia:

Fidelity & Deposit Company of Maryland, complainant, feeling aggrieved by the orders and decrees rendered and entered in the above entitled cause on the 31st day of July, 1933, does hereby appeal from the final decree of July 31, 1933, to the United States Circuit Court of Appeals, Fifth Circuit, for the reasons set forth in the assignment of errors herewith filed, and prays that the appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals, Fifth Circuit, under the rules of said Court in such cases made and provided;

And your petitioners further pray that a proper order relating to the required security to be required of them to be made.

Fidelity & Deposit Company of Maryland, Complainant. M. F. Goldstein, by Little, Powell, Reid & Goldstein, Solicitors of Record.

[fols. 21 & 22] Considering the foregoing petition this day presented, it is ordered that the appeal be allowed to the complainant in the above entitled and numbered cause, from the decree rendered against it herein; this said appeal shall be returnable to the U. S. Circuit Court of Appeals for the 5th Circuit; and that plaintiff shall give bond in the sum of One Thousand ($1,000.00) Dollars in the terms

of law; and that a transcript of the record be filed in the U. S. Circuit Court of Appeals according to law, as prayed for.

Granted, this 5 day of August, 1933.

Bascom S. Deaver, United States Judge.

Bond on Appeal for $1,000, approved and filed Aug. 5, 1933, omitted in printing.

[fol. 23] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed Aug. 5, 1933

The complainant-appellant, Fidelity & Deposit Co., of Maryland, in this action, in connection with its appeal, makes the following assignments of error which it avers occurred, upon the trial of the cause, to-wit:

1

Because the Court erred in the ruling made and entered in the cause July 7, 1933, sustaining the motion of the respondent and dismissing so much of complainant's bill as sought a lien upon the assets in the hands of the Receiver (respondent herein), for the amount of the deposit by the Treasurer of the State of Georgia in said bank, thereby refusing to give any force, effect or validity to the terms of the depositary bond given by the Hancock National Bank (of which respondent is Receiver), as provided for by the statute laws of Georgia, in force when said bond was given and at all times when said deposit was received, the said complainant being entitled to receive and obtain the full force and benefit of the said lien in the liquidation of a national bank to the full amount of the deposit made by the State of Georgia.

2

Because the Court committed error in holding (conclusions of law filed July 31, 1933):

"The said plaintiff herein, Fidelity and Deposit Co., is not for any reason entitled to priority of payment out of the assets in the hands of the Receiver,"

because it having been found as a fact that complainant succeeded to all the rights of the State of Georgia arising out of said deposit, complainant was therefore entitled to [fol. 24] priority of payment out of the assets in the hands of respondent because the lien on said assets to which respondent succeeded was not in anywise impaired or destroyed by the subsequent insolvency of said bank.

3

Because insofar as said decree places the rights of complainant on a parity with ordinary depositors, and deprives complainant of its lien rights arising out of the depositary bond and the statutes of Georgia creating a lien on the assets because of said bond, the said decree destroys the rights vested in the State of Georgia, to which complainant succeeded.

Wherefore, complainant prays that the judgment and decree of the District Court of the United States may be reversed.

Little, Powell, Reid & Goldstein, Solicitors for Complainant.

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Aug. 5, 1933

To the Clerk of the District Court of the United States for the Middle District of Georgia:

You are requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Fifth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following, and no other papers or exhibits, to-wit:

1. The original bill, omitting process and service.
2. The motion to dismiss of the defendants.

[fol. 25] 3. The order of the Court on the motion to dismiss dated July 7, 1933, together with the exception noted and allowed thereon.

4. The findings of fact and conclusions of law signed herein on July 31, 1933.

5. The final decree signed July 31, 1933.

6. The petition for appeal and order allowing same and fixing the bond all dated August 5, 1933.

7. The appeal bond.

8. The assignments of error.

9. This præcipe.

10. Citation to appellee and acknowledgment of service.

11. All entries of filing, together with acknowledgments of service wherever they appear, each in its proper place.

Little, Powell, Reid & Goldstein, Solicitors for Appellant.

Service of the foregoing præcipe acknowledged; copy received; further service waived. This August 5, 1933.

Miller & Lowrey, Solicitors for Appellee.

[fol. 26] Clerk's certificate to foregoing transcript omitted in printing.

RECITAL AS TO CITATION

Original Citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

No. 7104

FIDELITY & DEPOSIT CO. OF MARYLAND

versus

W. K. HOWARD, as Receiver of Hancock National Bank of Sparta, Georgia

ARGUMENT AND SUBMISSION

Extract from the Minutes of October 3rd, 1933

On this day this cause was called, and, after argument by M. F. Goldstein, Esq., for appellant, and Jas. A. Lowrey, Jr., Esq., for appellee, was submitted to the Court.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7104

FIDELITY & DEPOSIT CO. OF MARYLAND, Appellant,

versus

W. K. HOWARD, as Receiver of Hancock National Bank of Sparta, Georgia, Appellee

Appeal from the District Court of the United States for the Middle District of Georgia

(December 7, 1933)

Before Bryan, Foster and Sibley, Circuit Judges

OPINION OF THE COURT—Filed December 7th, 1933

SIBLEY, Circuit Judge:

This appeal seeks to assert the validity of the Georgia statutory lien for deposits of State funds against the property of an insolvent national bank which was a State de-

pository. By a statute passed in 1876, now §218 of the Code of Georgia, it is provided as to the State Treasurer's bond: "And all the property of the Treasurer to the full amount of said bond, and the property of the securities to the amount for which they may be severally bound, shall be liable for the faithful performance by the Treasurer of the duties of his office from the date of the execution of the bond, and a lien is hereby created in favor of the State upon the property of the Treasurer to the amount of said bond, and upon the property of the securities upon his bond to the amount for which they may be severally liable from the date of the execution thereof." In 1879 another Act was passed, found in §§1249 et seq. of the Code, providing that the Governor might appoint solvent banks of good standing and credit to be depositories for State funds for terms of four years without salary, and by §1252 said depositories shall before entering on the discharge of their duties by their proper officers execute a bond with good and sufficient sureties to be fixed and approved by the Governor, "Said bond shall be conditioned for the faithful performance of all such duties as shall be required of them by the General Assembly or the laws of this State, and for a faithful account of the money and effects that may come into their hands during their continuance in office. Said bond shall be filed and recorded in the Executive Office * * * and said bonds shall have the same binding effect as the bond required by law to be given by State Treasurers, and in case of default shall be enforced in like manner." The words last quoted mean that the depository's bond, like the Treasurer's, is a lien on the property of the principal and sureties from its date. Seay vs. Bank of Rome, 66 Ga. 609; Solquitt, Governor, vs. Simpson, 72 Ga. 501; Simpson & Ledbetter vs. Mathis, Sheriff, 79 Ga. 159. These early cases also establish that the lien extends to all property, including money and choses in action when they are in a receiver's hands, and that everyone is bound to take notice of it. In the case of Colquitt, Governor, vs. Simpson, a surety on a bond dated Nov. 18, 1879, sold land on Jan. 10, 1881, to purchasers who claimed ignorance that he was such surety. On April 1st, 1881, a fi. fa. was issued by the Governor on the bond and levied on the land. The purchasers were held charged with notice and their land was held subject to the lien. The lien therefore exists be-

fore insolvency and before default of the depository, and adheres to realty aliened to others. As to choses in action it is held the lien does not prevent the exercise of the ordinary rights of setoff. State vs. Brobston, Receiver, 94 Ga. 95. The statutes have been so construed to this day. Standard Accident Ins. Co. vs. Luther Williams Bank & Trust Co., 45 Ga. App. 831. National banks are expressly made eligible to appointment by §1253; and by an Act passed in 1893, §1256, there is a provision requiring a national bank to give bond in double the sum to be deposited although the general requirement is only that bonds shall cover fully the amount to be deposited; and a provision that all the State depositories may make bond by a deposit with the State Treasurer of State or United States bonds instead of by a personal bond.

Under these statutes so construed the Governor on July 6, 1928, appointed the Hancock National Bank of Sparta, Georgia, a State depository to receive State taxes, expressly referring to the Act of 1879 and requiring a bond of $10,000.00. On July 12 the Board of Directors of the Bank accepted the appointment and directed that the bond be made. A personal bond with surety was executed accordingly, the bond making explicit reference to the Act of 1879, and being conditioned as the Act requires. On the failure of the Bank, May 23, 1932, it had on deposit of State's money $6,221.73, which on demand was paid to the State by the surety, Fidelity & Deposit Company of Maryland, the State assigning its claim against the Bank. Relying both on this assignment and on its right of subrogation the surety brought a bill to assert the statutory lien against the assets in the hands of the Bank's receiver. On motion the bill was dismissed as respects the lien, but a claim as general creditor was decreed. The surety appeals.

It is not denied that the surety has all the rights that the State had against the Bank's property. The contention is that the State can have no such lien as against a national bank, and particularly none after its insolvency, since its assets are required by 12 U. S. C. A. §194 to be paid ratably to all creditors. It will be noticed that the lien asserted is not one involuntarily imposed by the State law, but created by the contract of the managing authorities of the Bank. The Bank was not compelled to accept the appointment, nor, having accepted, to give a bond carrying the

statutory lien, but might have made a special pledge instead. It elected to make a bond under the statute and by a reference to the statute established contractually the lien as clearly as if it had been set forth by express words. The true operation of the statute is to sanction and make lawful so far as it could such a contract. The real question is whether by federal law the contract is forbidden to a national bank.

It is first objected that such a bank, which constitutionally exists only because it is a fiscal agency of the federal government, cannot thus agree to act for the State government, nor bind itself to perform "all such duties as are required of it by the General Assembly." No duties, however, have ever been required except to receive and account for the public moneys, which is a banking function, and none are suggested which are incompatible with duty to the United States or to the banking public. It has been held that a State depository is not a State officer but only an agency to keep the public funds. Colquitt, Governor, v. Simpson, 72 Ga. 502. For fifty years national banks have served as such, and no conflict of duties has appeared.

It is next objected that the lien on all property of the bank when a bond is given is beyond the bank's powers because it disables the bank from functioning in that it cannot dispose of its lands unless the purchaser will rely on its warranty of title, and that even the money paid out and the stocks, bonds and notes transferred from it in the course of business would be encumbered with a lien which would prevent their acceptance. This objection applies to State as well as national banks. It is forcibly stated by Judge Barrett In re Blalock, 31 Fed. (2d) 612, and it was there denied that the lien held good on money, notes and accounts transferred by the bank in due course of trade. We think that conclusion correct. The Legislature could not have intended to tie up the commercial assets of the banks which become depositories so that they could do no business. Liens on such ambulatory property are usually not effective until in some way it has been seized and sequestered, as by garnishment or by the appointment of a receiver therefor. In the early case of Miller vs. Race, 1 Burr. 452, 1 Smith's Leading Cases 516, the question arose whether one who takes a stolen bank note in due course of trade gets a good title contrary to the general rule that

no one can pass a better title than he himself has. Lord Mansfield held the title good and gave such reasons as these: "Upon the general course of business and from the consequences to trade and commerce which would be much incommoded by a contrary determination"; "on account of the currency of them"; "it is necessary for the purposes of commerce that their currency should be established and secured." On similar reasons it should be supposed that the money, notes, stocks and bonds which are the stock in trade of a bank were not intended to be deprived by the State's lien of their commercial usefulness. An analogy may be found in the Georgia mortgage upon a stock of merchandise the lien of which, though known to the customer, is released from goods sold in the due course of trade and attaches to others acquired in their place. So a Georgia judgment which is a general lien against the defendant's property from its date does not affect the transfer in good faith of money, corporate stocks or choses in action until they are seized by levy, garnishment or receivership. A mortgage of rents or income from property is not effective until proceedings are begun to sequester them. Taxes in Georgia are a general lien against all the property of the taxpayer from the accrual of the tax, so that in this State from the first of each year when the taxes are returned until the end of the year when they are paid, every item of property in the State is necessarily under a tax lien, but business is not stopped thereby. Certain it is that for fifty-three years the banks, both State and national, have acted as state depositories under this lien without any practical embarrassment. Indeed, it is common knowledge that they have advertised on their street-signs and letterheads that they are state depositories as an evidence of their soundness and credit. The State courts have asserted the lien against cash and choses in action when captured by a receivership (Seay vs. Bank of Rome, Standard Accident Ins. Co. vs. Luther Williams Bank, supra), but never have asserted it as to commercial assets transferred in due course of business.

This construction of the operation of the lien also answers the objection that a national bank would thereby be prevented from selling its stocks as required by 12 U. S. C. A. §82, or from pledging bonds or other securities to the United States for public deposits under §90, or from se-

curing their circulating notes under §101. As held In Re Blalock, supra, pledges and sales of choses in action in due course of business are freed from the lien.

The securing of public deposits we have held to be within the banking powers of a national bank. Potorff vs. El Paso-Hudspeth Road District, 62 Fed. (2d) 498. Deposits of money of the United States must be secured. 12 U. S. C. A. §90. In Cook National Bank vs. United States, 107 U. S. 445, it is said: "The amount of security which the Secretary may thus require has no limit but his own judgment as to its necessity. . . . The Government can thus always have security limited in amount only by the judgment of the Secretary of the Treasury for public money deposited in any national bank." The bank, therefore, can not only give him its best securities but all it has. The creation by means of a bond of a lien against the entire assets of a State bank for a debt to the United States was upheld in United States vs. Robertson, 5 Pet. 641. That this was the effect of the decision is pointed out in the dissent at its conclusion; and this effect of the decision was again asserted in Planters Bank vs. Sharp, 6 How. at page 323. If the United States may have as security the bank's entire assets we see no reason why a State may not have a contract lien on them. The Comptroller of the Currency for fifty years has approved the receipt by national banks in Georgia of State deposits under this contract for a general lien on all property. With knowledge presumably of it the Congress on June 25, 1930, so amended 12 U. S. C. A. §90 as to provide: "Any association may upon the deposit with it of public money of a State or any political subdivision thereof give security for the safekeeping and prompt payment of the money so deposited of the same kind as authorized by the law of the State in which such association is located in the case of other banking institutions in the State." We regard this legislation as declaring and defining the power to secure such deposits rather than as creating it. It certainly does not prohibit the kind of security long authorized by the laws of Georgia, and given by the banks in Georgia. But after all a sufficient pledge of specific assets does the same harm to general creditors as if more assets or all had been pledged. In either case the secured creditor gets fully paid and general creditors get the remainder. A deposit of public funds in-

creases the assets of the bank by the amount of the deposit, and any sufficient method of security merely returns that increase according to agreement. We cannot say that the voluntary creation of a general lien provided by the Georgia statute is beyond the power of a national bank.

But it is urged that the lien can have no operation in case of insolvency because of 12 U. S. C. A. §91, prohibiting preferences made in view of insolvency, and §194 requiring the payment of ratable dividends to creditors. The statutes do not affect liens validly existing against the bank's property before receivership. They were considered in Scott vs. Armstrong, 146 U. S. 499, and on page 510 it is said. "Liens, equities or rights arising by express agreement or implied from the nature of the dealings between parties or by operation of law prior to insolvency and not in contemplation thereof are not invalidated"; and again in Earle vs. Pennsylvania, 178 U. S. 449, at page 454: "The right thus acquired by the service of the attachment was not lost by the suspension of the bank and the appointment of the receiver. The assets of the bank passed to the receiver burdened as to the interests that Long had in them with a lien in favor of the plaintiff in attachment which could not be disregarded or displaced by the Comptroller of the Currency." The lien here involved, as we have pointed out, arises by a voluntary contract and exists from the date of the bond of which it forms a part. In spite of its generality it is not a priority arising on the insolvency of the bank. Insolvency is nowhere mentioned in the statutes defining it. It is true that the lien seldom needs assertion unless insolvency occurs, but that is true of all security. The lien on all property of the signers of the bond may be compared to the tax lien on all property of the taxpayer. That such tax liens are true liens and not priorities on insolvency we held in enforcing them against assets in bankruptcy, In Re Brannon, 62 Fed. (2d) 959. The preference under state laws which was attempted to be enforced against bank assets in Davis vs. Elmira Bank, 161 U. S. 275, was a priority arising only on insolvency, indeed a part of the state statutes for administering an insolvent bank, and was in conflict with §194.

Finally attention has been called to the provision of the Act of 1893, Code §1256, requiring double bond of a national bank as a state depository. It is argued that this

difference was made because the Legislature knew the state could have no lien against national banks. We have been unable to find sufficient support for the proposition that the state can have no such lien, and none at all for that being the reason for the difference made. The reason may have been that the state has no power to examine national banks as it does state banks. The discrimination seems indeed not to be enforced, for this bank under a bond of $10,000.00 had a deposit of over $6,000.00 on May 23rd, and it may be judicially noticed that taxes in Georgia are due in December and collections are at their flood tide in January.

The sum of the matter is this: The state with an express reference to its statutes making the bond a general lien from its date offered to deliver money to the bank if the bank would give a $10,000.00 bond; the directors accepted the offer and the bank gave the bond, again referring to the statute, and received the money. We find no adequate reason why the lien established by the law and by the agreement was not good from the date of the bond, and is not enforceable against the bank's property of all kinds now in the receiver's hands. We reverse the dismissal of the bill as respects the lien, and remand the cause for further proceedings not inconsistent with this opinion.

Teste.

No. 7104

FIDELITY & DEPOSIT CO. OF MARYLAND

versus

W. K. HOWARD, as Receiver of Hancock National Bank of Sparta, Georgia

JUDGMENT

Extract from the Minutes of December 7th, 1933

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Georgia, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the judgment of

the said District Court in this cause dismissing the bill as respects the lien be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered, adjudged and decreed that the appellee, W. K. Howard, as Receiver of Hancock National Bank, of Sparta, Georgia, be condemned to pay the costs of this cause in this Court.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7104

FIDELITY & DEPOSIT CO. OF MARYLAND, Appellant,

vs.

W. K. HOWARD, as Receiver of Hancock National Bank of Sparta, Georgia, Appellee

Petition for Stay of Mandate

MOTION AND ORDER STAYING MANDATE—Filed December 27th, 1933

To the Honorable United States Circuit Court of Appeals for the Fifth Circuit and the Honorable Judges thereof:

Comes now W. K. Howard in his official capacity as Receiver of Hancock National Bank and shows that on December 7, 1933, this Honorable Court rendered an opinion in the above stated case adverse to appellee, reversing the judgment of the United States District Court for the Middle District of Georgia, wherein that court dismissed the petition of Fidelity & Deposit Company of Maryland insofar as it sought to establish a lien on the assets of the Hancock National Bank by reason of Sects. 1252 and 218 of the Code of Georgia; and this court in its opinion directed that the cause be remanded for further proceedings not inconsistent with said opinion.

Said Receiver, appellee above named, has been authorized and directed by the Comptroller of the Currency to apply

to the United States Supreme Court for a certiorari to have said case certified to the Supreme Court, and has been directed by the Comptroller of the Currency to apply for a stay of the mandate of this court in the above stated case.

Said Receiver intends to apply for said certiorari within the next sixty days.

Wherefore said Receiver prays that the mandate of this court be stayed for a period of sixty days as provided in Sect. 350 U. S. C. A., Title 28, and that he be relieved of giving any bond for damages and costs as provided in Sect. 870 U. S. C. A., Title 28.

(Signed) Sam H. Wiley, Jas. A. Lowrey, Wallace Miller, Attorneys for Appellee.

GEORGIA,
Bibb County:

I, Wallace Miller, do solemnly swear that I am one of counsel for W. K. Howard, appellee herein, and that the said W. K. Howard was instructed and directed by the Comptroller of the Currency of the United States by long distance on this date, to-wit, December 26, 1933, to apply for a stay of the mandate of this court in the above stated case, and to petition the Supreme Court of the United States for its writ of certiorari directed to this court requiring that said case be certified to the Supreme Court of the United States for determination by it.

This affidavit is made by me as counsel for the reason that an affidavit from W. K. Howard cannot be obtained within the time required by the rule of this court for obtaining a stay of mandate in this case.

(Signed) Wallace Miller.

Sworn to and subscribed before me, this 26th day of Dec., 1933. (Signed) Margaret Haverfield, Notary Public, State of Georgia at Large. (Seal.)

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 7104

FIDELITY & DEPOSIT CO. OF MARYLAND, Appellant,

versus

W. K. HOWARD, as Receiver of Hancock National Bank of Sparta, Georgia, Appellee

On consideration of the application of the appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record and brief have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 27th day of December, 1933.

(Signed) Rufus E. Foster, United States Circuit Judge.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 7104

FIDELITY & DEPOSIT CO. OF MARYLAND, Appellant,

versus

W. K. HOWARD, as Receiver of Hancock National Bank of Sparta, Georgia, Appellee

On consideration of the application of the appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for an additional period of thirty days from January 26, 1934, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from said date there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record and brief have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from January 26, 1934, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 23rd day of January, 1934.

(Signed) Rufus E. Foster, United States Circuit Judge.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify

that the pages numbered from 27 to 42 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 7104, wherein Fidelity & Deposit Co. of Maryland, is appellant, and W. K. Howard, as Receiver of Hancock National Bank, of Sparta, Georgia, is appellee, as full, true and complete as the original of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 26 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 27th day of December, A. D. 1933.

Oakley F. Dodd, clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals for the Fifth Circuit.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7104

FIDELITY & DEPOSIT CO. OF MARYLAND, Appellant,

vs.

W. K. HOWARD, as Receiver of Hancock National Bank of Sparta, Georgia, Appellee

Motion for Substitution of Party Appellee

MOTION TO SUBSTITUTE JOHN C. LEWIS, AS RECEIVER, ETC., IN PLACE OF W. K. HOWARD, DECEASED—Filed February 9th, 1934

Comes now John C. Lewis, in his capacity as Receiver of the Hancock National Bank of Sparta, Georgia, and successor to the late W. K. Howard, deceased, as Receiver of said bank, and shows to the Court:

1

W. K. Howard died on January 19, 1934, and up to the time of his death was Receiver of the Hancock National Bank of Sparta, Georgia, and as said Receiver the appellee in the above stated case.

2

On January 23rd, 1934, your movant, John C. Lewis, was duly appointed Receiver of said Hancock National Bank and successor to the said W. K. Howard as Receiver of said bank, and has duly qualified as said Receiver, and is now the successor in office of the said W. K. Howard as said Receiver.

3

Movant shows that he desires to perfect and file with the Supreme Court of the United States a petition for certiorari, and it is necessary that he be made, in his official capacity as said Receiver, the party appellee in the above stated case, to the end that he may apply for a writ of certiorari to the Supreme Court of the United States to have that Court review and adjudicate the questions involved in the above stated case.

4

Movant shows further that in the event the Supreme Court does not reverse the judgment of this Court it will be necessary that movant, in his capacity as said Receiver, be a party to said suit in order that proper judgment may be entered in the trial court.

5

Movant shows that the above stated case relates to the discharge of the official duties of the Receiver of the Hancock National Bank.

Wherefore, Movant prays that he, as Receiver of the Hancock National Bank of Sparta, Georgia, be substituted for the said W. K. Howard as said Receiver in said suit, and that this Court permit said cause to be continued and maintained against him as successor in office to the said W. K. Howard, deceased.

(Signed) Sam H. Wiley, Jas. A. Lowrey, Jr., Wallace Miller, Attorneys for Movant.

GEORGIA,
Hancock County:

In person appeared before the undersigned officer, authorized to administer oaths, John C. Lewis, who, being first sworn, deposes and says that the allegations of fact set forth in the foregoing motion are true, and that he is now the duly qualified and acting Receiver of the Hancock National Bank and successor in said office of the late W. K. Howard, deceased.

(Signed) John C. Lewis.

Sworn to and subscribed before me, this 7 day of February, 1934. (Signed) Mrs. T. L. Reese, Ordinary Hancock County, Georgia. (Seal.)

Due and legal notice of the foregoing application of John C. Lewis, as Receiver of the Hancock National Bank, to be substituted for W. K. Howard as Receiver of said bank in the above stated cause is acknowledged; and the Fidelity & Deposit Company of Maryland, appellant in said cause, hereby consents to said substitution.

This February —, 1934.

(Signed) Max F. Goldstein, Little, Powell, Reid & Goldstein, Attorneys for Fidelity & Deposit Company of Maryland.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7104

FIDELITY & DEPOSIT CO. OF MARYLAND

versus

W. K. HOWARD, as Receiver of Hancock National Bank in Sparta, Georgia

ORDER SUBSTITUTING JOHN C. LEWIS, AS RECEIVER, ETC., IN PLACE OF W. K. HOWARD, DECEASED

Extract from the Minutes of February 9th, 1934

It appearing from the verified motion of John C. Lewis that W. K. Howard died January 19, 1934, and that the

said John C. Lewis has succeeded him as Receiver of the Hancock National Bank, of Sparta, Georgia, and the Fidelity & Deposit Company of Maryland having consented that said John C. Lewis, as Receiver of the Hancock National Bank, be substituted for W. K. Howard, as Receiver of said bank, as a party in the above stated case;

It is ordered that the said John C. Lewis, as Receiver of the Hancock National Bank of Sparta, Georgia, be, and he is hereby, substituted as a party for the said W. K. Howard, as Receiver of said bank in said cause, and the case continued and maintained with the said John C. Lewis, as Receiver of the Hancock National Bank, substituted for the said W. K. Howard, as said Receiver.

Oakley F. Dodd, Clerk; U. S. Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

Clerks Office. Attest. A true copy.

New Orleans, La., February 9th, 1934.

(4611-c)

[fol. 48] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 19, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter J. F. Anderson. File No. 38,405. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 802. John C. Lewis, as Receiver of the Hancock National Bank of Sparta, Georgia, petitioner, vs. Fidelity & Deposit Company of Maryland. Petition for a writ of certiorari and exhibit thereto. Filed February 19, 1934. File No. 802, O. T., 1933.